

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ELIZABETH A. CORNING

Claimant

VS.

SUSAN B. ALLEN MEMORIAL HOSPITAL

Respondent

AND

LIBERTY INSURANCE CORPORATION,

ACCIDENT FUND NATIONAL

INSURANCE and UNITED WISCONSIN

INSURANCE COMPANY

Insurance Carriers

Docket No. 1,055,077

ORDER

STATEMENT OF THE CASE

Respondent and United Wisconsin Insurance Company appealed the July 14, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. Roger A. Riedmiller of Wichita, Kansas, appears for claimant. P. Kelly Donley of Wichita, Kansas, appears for respondent and United Wisconsin Insurance Company (United). Daniel S. Bell of Kansas City, Missouri, appears for respondent and Liberty Insurance Corporation (Liberty).

From January 1, 2005, through January 1, 2009, Liberty was the respondent's workers compensation insurance carrier. United's coverage began January 1, 2010, and extends through January 1, 2012. At the July 14, 2011, preliminary hearing, United's counsel indicated that Accident Fund National Insurance (Accident Fund) provided coverage approximately from January 1, 2009, through January 1, 2010.¹ Accident Fund was not represented at any of the proceedings in this claim.

¹ P.H. Trans. at 5.

Claimant alleges that in 2006 she suffered a right shoulder injury arising out of and in the course of her employment with respondent. The right shoulder was injured in a single traumatic incident. Claimant immediately notified her supervisor and was sent to the emergency room. United and Liberty acknowledge claimant timely notified respondent of the accident causing the right shoulder injury. Respondent also provided claimant with treatment by Dr. V. C. Reddy and physical therapy.

At the preliminary hearing, claimant's counsel proffered that claimant made a written claim on March 23, 2011. No party objected to March 23, 2011, as being the date claim was made.² The application for hearing, which was filed on March 22, 2011, indicates claimant suffered injuries to her shoulders, neck, spine and all affected body parts.

In January 2006, when claimant suffered the traumatic right shoulder injury, she also began having problems with her left shoulder and experiencing low back pain. Claimant did not notify respondent of her left shoulder injury or of the low back pain. She attributes the left shoulder and low back symptoms to the repetitive job duties performed at her job.

Claimant continued to have problems with both shoulders. In 2007, she sought medical treatment on her own. Claimant eventually had surgery on both shoulders. Both shoulder surgeries and follow-up treatment were paid for by claimant's health insurance carrier. After recovering from the surgeries claimant returned to the same job duties without restrictions.

Claimant alleges she aggravated her preexisting shoulder condition through a series of microtraumas with an accident date of March 23, 2011, the date she served a written claim on respondent. United asserts that claimant's current shoulder problems are causally related to the 2006 accident. United contends that Liberty, the insurance carrier for respondent in 2006, should be liable for claimant's injuries.

Liberty alleges claimant's date of accident for her current shoulder injuries is March 23, 2011. Consequently, claimant's injury falls within United's period of coverage. If claimant's current injuries are causally related to the 2006 accident, Liberty asserts claimant failed to file a timely written claim.

The ALJ's Order found claimant was injured out of and in the course of her employment with respondent on March 23, 2011, the date she served a written claim on respondent. The Order does not specify which of claimant's injuries the ALJ was referring to, but presumably the Order applies to neck, back, and right and left upper extremity injuries as those are the injuries claimant is alleging. The ALJ authorized Dr. Daniel J. Prohaska as the treating physician and assessed benefits against United.

² *Id.*, at 4.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 14, 2011, preliminary hearing and exhibits; the transcript of the June 29, 2011, discovery deposition of claimant; and all pleadings contained in the administrative file.

ISSUES

1. Did claimant suffer a right shoulder injury arising out of and in the course of her employment with respondent?
2. If so, what is the date of accident for claimant's right shoulder injury?
3. If the date of accident for claimant's right shoulder injury is January 5, 2006, did she make a timely written claim?
4. Did claimant suffer left shoulder, neck and back injuries arising out of and in the course of her employment with respondent?
5. If so, what is the date of accident for claimant's left shoulder, neck and back injuries?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

In 2006, claimant was working as a nurse in the recovery room of the respondent. On January 5, 2006, she injured her right shoulder assisting a patient onto a bedpan. Claimant reported the injury to her employer and was sent to the emergency room where she worked. Respondent referred claimant to Dr. V. C. Reddy for treatment. However, he prescribed no treatment for her low back. Dr. Reddy restricted claimant to rest for one week and then returned her to work with no restrictions. Claimant testified this was on January 10, 2006. She returned to her normal job duties in the recovery room. Claimant did not file a written claim for workers compensation at that time.

In April 2006, claimant went back to Dr. Reddy for her right shoulder and requested physical therapy. Claimant testified Dr. Reddy examined her low back, but did not indicate the date he did so. Claimant underwent physical therapy for approximately a week and on April 21, 2006, was released to return to work without restrictions. She returned to her normal work duties.

After returning to work, claimant had problems with both shoulders and sought treatment from Dr. Pat Do in 2007. Claimant went to see Dr. Do on her own. Dr. Do initially treated claimant's left shoulder, because it was hurting worse than her right.

Claimant's left shoulder began hurting about the same time as the right, but she does not remember a specific date it occurred. She did not make a claim for workers compensation benefits for the left shoulder at that time and treatment was paid for by her health insurance. Dr. Do performed surgery on the left shoulder in 2007. After recovering, claimant returned to work performing her normal work duties without restrictions.

Claimant also received treatment from Dr. Do for the right shoulder. He performed surgery on claimant's right shoulder in 2009. After recovering from surgery, claimant returned to work performing her normal work duties without restrictions. After claimant's surgeries, she continued to periodically see Dr. Do, or his physician's assistant. Dr. Do's medical reports were not made part of the record.

Claimant continued to have pain in her shoulders. On February 3, 2011, claimant sought treatment on her own from Dr. Daniel J. Prohaska, an orthopedic surgeon. A bilateral shoulder MRI and MR arthrogram were ordered. The results disclosed a bilateral shoulder recurrent rotator cuff tear. Dr. Prohaska recommended a left arthroscopy with revision rotator cuff repair, which would necessitate claimant being in a sling 6-8 weeks.

Claimant testified that her right shoulder got worse after seeing Dr. Reddy. She also indicated that after her surgeries, she continued to have left and right shoulder symptoms. At her deposition, claimant testified that her left shoulder symptoms increased after being released by Dr. Do. She attributed this to her ". . . everyday repetitious job."³ She also stated that her neck symptoms progressed in the last year. At the preliminary hearing, claimant testified that after the right shoulder surgery in 2009 until 2011 when she saw Dr. Prohaska, her shoulders continued to get worse.

Claimant told her director, Nelson Woodson, about seeing Dr. Prohaska. She was told by Mr. Woodson that if she had another surgery, she could not work with any restrictions. Claimant told Mr. Woodson ". . . this could have been a Workmen's Comp. case way back . . ."⁴ Claimant then sought the services of her counsel and a written claim was served upon respondent on March 23, 2011. This was the first written claim made by claimant. The application for hearing lists a date of accident as 2006 and each working date thereafter. The injury claimed is to the shoulders, neck, spine, and all other affected body parts.

At the request of her counsel, claimant saw Dr. George G. Fluter on April 28, 2011. He reviewed the medical records of the Susan B. Anthony Memorial Hospital, Dr. Reddy, Dr. Do and Dr. Prohaska. Claimant reported she had right shoulder pain as early as the 1990s. She had work-related left neck/shoulder and right low back strains in 1999.

³ Corning Depo. at 18.

⁴ P.H. Trans. at 20.

Dr. Fluter's assessment was that claimant had numerous bilateral shoulder problems, neck/upper back pain, cervicothoracic strain/sprain, myofascial pain affecting the neck/upper back, low back pain, and myofascial pain affecting the lower back. He imposed significant restrictions upon claimant. He also indicated that depending upon diagnostic test results and response to treatment, repeat right and left arthroscopy may be necessary.

On July 8, 2011, Dr. Fluter sent a letter to claimant's counsel clarifying the issue of causation. He stated:

It is my opinion, within a reasonable degree of medical probability, that Ms. Corning's condition is causally related to the initial injury occurring in January, 2006 with ongoing aggravation from repetitive activities involving the upper extremities as part of her job duties while working in the recovery room.⁵

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁶ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁷

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁸

⁵ *Id.*, Cl. Ex. 5 at 1.

⁶ K.S.A. 2010 Supp. 44-501(a).

⁷ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

⁸ *Id.*, at 278.

K.S.A. 2010 Supp. 44-501(a) in part states: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2010 Supp. 44-508(d) states:

"Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

K.S.A. 2010 Supp. 44-508(e) states:

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

K.S.A. 44-520a(a) states:

No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁰

ANALYSIS

Claimant initially injured her right shoulder on January 5, 2006, while assisting a patient. She was restricted to a week of rest by Dr. Reddy, an authorized treating physician. She then returned to her normal job duties without restrictions. At approximately the same time, claimant began experiencing left shoulder pain and back problems. She attributed this to the repetitive nature of her job. Claimant was never taken off work or given work restrictions by an authorized physician for her left shoulder or low back as a result of performing her regular work duties.

Until claimant filed her claim on March 23, 2011, the only authorized medical treatment she received was at respondent's emergency room and from Dr. Reddy. This treatment was limited to her right shoulder. At claimant's expense, Dr. Do performed surgery on both shoulders. Claimant testified that since 2006, both shoulders have gotten worse.

K.S.A. 2010 Supp. 44-508(d) determines the date of injury in repetitive injury claims. Claimant was never taken off work or given restrictions by an authorized physician for her left shoulder, neck or back. Consequently, K.S.A. 2010 Supp. 44-508(d) provides the date of accident for claimant's left shoulder, neck and back injuries is the earlier of the dates she gave written notice to the employer of the injury or the condition is diagnosed as work related and that fact is communicated to the claimant in writing.

⁹ K.S.A. 44-534a.

¹⁰ K.S.A. 2010 Supp. 44-555c(k).

Dr. Do provided ongoing treatment for claimant's left shoulder in 2007 and eventually operated on it. However, there is nothing in the record to indicate that Dr. Do or any other physician ever communicated in writing to claimant that her left shoulder injury was work related. Therefore, the earliest date of accident for claimant's left shoulder, neck and back injuries is March 22, 2011, the date she filed her application for hearing.

On January 5, 2006, claimant suffered a traumatic injury to the right shoulder. Claimant immediately gave notice to her employer of the traumatic right shoulder injury. She was restricted to rest a week by Dr. Reddy, an authorized physician. This Board Member finds that the date of accident of claimant's traumatic, right shoulder injury was January 5, 2006.

Liberty alleges that if claimant suffered a traumatic shoulder injury in January 2006, she failed to timely make a written claim. Claimant testified she told her supervisor of the right shoulder injury shortly after the accident. However, no evidence was presented to indicate claimant made a timely written claim within 200 days after the last date claimant was paid medical benefits. Therefore, claimant failed to file a timely written claim of her traumatic right shoulder injury as required by K.S.A. 44-520a.

After claimant was treated for her traumatic right shoulder injury by Dr. Reddy she returned to her normal work duties without restrictions. After Dr. Do performed surgery on claimant's right shoulder, she was released to her normal work duties without restrictions. Claimant testified that returning to work without restrictions made both shoulders worse. Her right shoulder continued to worsen until she filed the application for hearing.

This Board Member finds that following claimant's return to work after her traumatic right shoulder injury, she then suffered a series of repetitive injuries to the same right shoulder. After Dr. Reddy released claimant in January 2006, and again in April 2006, she was never seen by an authorized physician for her right shoulder. Nor did another physician communicate to her in writing that her condition was work related. Consequently, claimant's date of accident for her repetitive right shoulder injury is March 22, 2011, the date claimant filed her application for hearing.

Claimant provided the only testimony as to the cause of her injuries. She indicated that she initially suffered a traumatic right shoulder injury at work in 2006. At about the same time, she began having left shoulder and back pain. She attributed her injuries to her repetitive job duties. After returning to work following her traumatic right shoulder injury, claimant indicated her repetitive duties aggravated her right shoulder condition. Dr. Fluter's report states that claimant's initial injury in 2006 was aggravated by ongoing repetitive job duties.

Dr. Fluter's report indicates claimant has neck/upper back pain, cervicothoracic strain/sprain, myofascial pain affecting the neck/upper back, low back pain, and myofascial pain affecting the lower back. Claimant testified that she had symptoms of pain in her back

and that Dr. Reddy examined her back. This Board Member finds claimant's right shoulder injuries, left shoulder injury and neck and back injuries arose out of and in the course of her employment with respondent.

CONCLUSION

1. Claimant suffered left shoulder, neck and back injuries arising out of and in the course of her employment with respondent as a result of repetitive microtraumas culminating on March 22, 2011. Claimant gave timely notice of and made a timely claim for this injury.

2. Claimant suffered a traumatic right shoulder injury in January 2006, arising out of and in the course of her employment with respondent, but failed to make a timely claim pursuant to K.S.A. 44-520a.

3. Claimant suffered a subsequent right shoulder injury arising out of and in the course of her employment with respondent. The second right shoulder injury was a result of repetitive microtraumas culminating on March 22, 2011. Claimant gave timely notice of and made a timely claim for this injury.

WHEREFORE, the undersigned Board Member modifies the July 14, 2011, preliminary hearing Order entered by ALJ Clark and finds the date of accident for the repetitive microtrauma injuries is March 22, 2011. The ALJ's Order authorizing Dr. Daniel Prohaska as claimant's treating physician, ordering all medical to be paid and assessing benefits against United Wisconsin Insurance Company remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of October, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Daniel S. Bell, Attorney for Respondent and Liberty
P. Kelly Donley, Attorney for Respondent and United
John D. Clark, Administrative Law Judge